

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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JON GREGORY SANCHEZ,

Plaintiff,

v.

JAMES BORELLI and KELLY BORELLI and
the FINANCIAL INDUSTRY
REGULATORY AUTHORITY

Defendants.

3:15-CV-00455-LRH-WGC

ORDER

Before the Court is Plaintiff Jon Gregory Sanchez's ("Sanchez") Motion to Vacate Arbitration Award. ECF No. 1.¹ Defendants James Borelli and Kelly Borelli ("the Borellis") filed an Opposition to Motion to Vacate and Countermotion to Confirm. ECF No. 11. Sanchez filed a Reply to the Opposition to Motion to Vacate and an Opposition to the Countermotion to Confirm. ECF No. 22. Sanchez also filed a Motion to Strike Opposition and Related Documents. ECF No. 18. The Borellis filed an Opposition to the Motion to Strike and a Countermotion to Dismiss. ECF No. 23 and 25. Sanchez filed a Reply to the Opposition to the Motion to Strike. ECF No. 26. He also filed an Opposition to the Countermotion to Dismiss. ECF No. 27. Defendant Financial Industry Regulatory Authority ("FINRA") filed a Motion to Dismiss. ECF No. 28. Sanchez filed a Response. ECF No. 30. FINRA filed a Reply. ECF No. 33.

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¹ Refers to the Court's docket number.

I. Factual Background

On April 29, 2014, the Borellis brought a claim against Sanchez for the mismanagement of part of their investment portfolio. The dispute was arbitrated by FINRA. After a hearing, the FINRA arbitrator issued a written decision awarding the Borellis \$40,000 in damages on August 5, 2015. On September 4, 2015, Sanchez filed a Petition for Judicial Review/Motion to Vacate the Arbitration Award. ECF No. 1. On December 14, 2015, the Borellis filed an Opposition to Motion to Vacate and Countermotion to Confirm. ECF No. 11. On December 31, 2015, Sanchez filed a Reply to the Opposition to Motion to Vacate and an Opposition to the Countermotion to Confirm. ECF No. 22. Sanchez also filed a Motion to Strike Opposition and Related Documents on December 22, 2015. ECF No. 18. On January 4, 2016, the Borellis filed an Opposition to the Motion to Strike and a Countermotion to Dismiss. ECF No. 23 and 25. On January 11, 2016 Sanchez filed a Reply to the Opposition to the Motion to Strike. ECF No. 26. He also filed an Opposition to the Countermotion to Dismiss on January 21, 2016. ECF No. 27. On February 5, 2016, FINRA filed a Motion to Dismiss. ECF No. 28. On February 17, 2016, Sanchez filed a Response. ECF No. 30. On February 26, 2016, FINRA filed a Reply. ECF No. 33.

II. Legal Analysis

The federal court is one of limited jurisdiction. *Gould v. Mutual Life Ins. Co. of New York*, 790 F.2d 769, 774 (9th Cir.1986). The Court possesses only that power authorized by the Constitution or a statute. *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986). It is presumed that a cause lies outside this limited jurisdiction. *Turner v. President of Bank of N. Am.*, 4 U.S. (Dall.) 8, 11 (1799). The burden of establishing subject matter jurisdiction is on the party asserting it. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). The party asserting jurisdiction in this case is the petitioner, as Sanchez commenced the instant action in this court. *Tosco Corp. v. Communities For A Better Env't*, 236 F.3d 495, 499 (9th Cir. 2001) (quoting *Smith v. McCullough*, 270 U.S. 456, 459, 46 S.Ct. 338, 70 L.Ed. 682 (1926)) (“A plaintiff suing in federal court must show in his pleading, affirmatively and distinctly, the

1 existence of whatever is essential to federal jurisdiction, and, if he does not do so, the court, on
 2 having the defect called to its attention or on discovering the same, must dismiss the case, unless
 3 the defect be corrected by amendment.”). The court cannot reach the merits of any dispute until
 4 it confirms its own subject matter jurisdiction. *Steel Co. v. Citizens for a Better Env't*, 523 U.S.
 5 83, 93–94, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). “Jurisdiction is power to declare the law,
 6 and when it ceases to exist, the only function remaining to the court is that of announcing the fact
 7 and dismissing the cause.” *Id.* (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514, 19 L.Ed.
 8 264 (1868)).

9 Although the Federal Arbitration Act (“FAA”) creates substantive law governing
 10 arbitration agreements, the statute does not confer subject matter jurisdiction on the federal
 11 courts. *Southland Corp. v. Keating*, 465 U.S. 1, 16, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984); *Carter*
 12 *v. Health Net of Cal., Inc.*, 374 F.3d 830, 833 (9th Cir. 2004). Accordingly, a petition under the
 13 FAA to confirm, vacate, or modify an arbitration award may be brought in federal court only if
 14 an independent basis of jurisdiction exists. *Id.*

15 **A. Diversity Jurisdiction**

16 In order to establish federal jurisdiction under § 1332, Sanchez must establish that the
 17 petitioner and the respondent are citizens of different states and that the amount in controversy
 18 exceeds \$75,000. 28 U.S.C. § 1332. The parties here are citizens of different states. Sanchez is
 19 a resident of California, and the Borellis are residents of Nevada. Thus, the key issue is the
 20 amount in controversy. In the initial, underlying arbitration, the Borellis sought \$100,000, but
 21 the arbitration award was only \$40,000, which would be under the required amount in
 22 controversy.

23 In *Theis Research, Inc. v. Brown & Bain*, 400 F.3d 659, 661 (9th Cir. 2005), the Ninth
 24 Circuit was asked to determine whether the amount-in-controversy requirement for diversity
 25 jurisdiction was “measured by the amount of the [arbitration] award or by the amount in dispute
 26 in the underlying litigation between the parties.” The plaintiff had moved to vacate an arbitration
 27 award of zero dollars, and at the same time the plaintiff also filed a complaint seeking damages
 28 for substantially the same claims asserted in the underlying arbitration. *Id.* The court held that

1 the amount in controversy was met because the plaintiff was seeking to obtain \$200 million in
 2 damages, which equated to a request to reopen its arbitrated claims: “Although neither Theis nor
 3 B & B asked that the arbitration proceedings be reopened, Theis sought to obtain by its district
 4 court complaint substantially what it had sought to obtain in the arbitration. Theis simply chose
 5 to ‘reopen’ its claims in the district court rather than in arbitration.” *Id.* at 665.

6 In reaching its conclusion, the *Theis Research* court noted that there is a split among the
 7 circuits on this issue, and in general “the cases have turned upon whether the party seeking to
 8 vacate an arbitration award also sought to reopen the arbitration.” *Id.* at 664 (citing cases). The
 9 court cited *Baltin v. Alaron Trading Corp.*, 128 F.3d 1466 (11th Cir. 1997), in which the court
 10 found the amount in controversy was not met where the plaintiffs sought to vacate an arbitration
 11 award requiring them to pay \$36,284.69 but did not seek to reopen arbitration, because “[t]he
 12 maximum remedy sought by the Baltins was the vacatur of the arbitration award” which did not
 13 meet the jurisdictional minimum. *Theis Research*, 400 F.3d at 665. The same result was reached
 14 in *Ford v. Hamilton Investments, Inc.*, 29 F.3d 255 (6th Cir.1994), because the plaintiffs sought
 15 only to vacate a \$30,524 arbitration award and neither party sought additional damages. *Theis*
 16 *Research*, 400 F.3d at 665. The court in *Ford* “was quite clear that had the losing party sought to
 17 challenge the arbitrator's denial of that party's counterclaims,” which were valued over the
 18 jurisdictional minimum, then the amount in controversy would have been met. *Id.* (citing *Ford*,
 19 29 F.3d at 260; accord *Peebles v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 431 F.3d 1320
 20 (11th Cir. 2005) (holding amount in controversy was met where plaintiff sought to vacate a zero-
 21 dollar award and requested a new hearing before a different arbitration panel where he would
 22 seek recovery of up to \$2 million).

23 “When a petitioner seeks confirmation or vacatur of an award, without seeking a remand
 24 for further arbitration proceedings, ‘the amount in controversy is the value of the award itself to
 25 the petitioner.’” *Wise v. Marriott Int’l, Inc.*, 2007 WL 2200704, at *4 (S.D.N.Y. July 30, 2007)
 26 (quoting *N. Am. Thought Combine, Inc. v. Kelly*, 249 F.Supp.2d 283, 285 (S.D.N.Y.2003)).
 27 Here, Sanchez is simply asking the Court to set aside the arbitrator’s \$40,000 award. Neither of
 28 the parties is asking this Court for an order reopening arbitration or awarding damages. Because

all that is at stake from the outcome of this matter is \$40,000 that is the amount in controversy. *See Coffey v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. CV 12-00176 PA PJWX, 2012 WL 94545, at *3 (C.D. Cal. Jan. 11, 2012); *Hansen Beverage Co. v. DSD Distributors, Inc.*, No. 08CV0619-LAB(RBB), 2008 WL 5233180, at *5 (S.D. Cal. Dec. 12, 2008). Because \$40,000 does not exceed \$75,000, there is no diversity subject matter jurisdiction in this case.

B. Federal Question Jurisdiction

Section 1331 invests in district courts “original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331. While “the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction [.]” *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 813, 106 S. Ct. 3229, 3234, 92 L. Ed. 2d 650 (1986) (footnote omitted), a case is deemed to “arise under” federal law “where the vindication of a right under state law necessarily turns on some construction of federal law ...” *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 9, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983).

The FAA does not itself confer federal subject matter jurisdiction; rather, there must be an independent jurisdictional basis. *Carter v. Health Net of Cal., Inc.*, 374 F.3d 830, 833 (9th Cir. 2004). Additionally, a petition to vacate or confirm an arbitration award does not “arise under” federal law merely because “the underlying arbitration involves a federal question.” *Luong v. Circuit City Stores, Inc.*, 368 F.3d 1109, 1111 (9th Cir. 2004). A court may not “look through” to the arbitration claims in determining subject matter jurisdiction; the fact that the underlying arbitration involved federal claims does not confer federal jurisdiction for the petition to vacate, modify, or correct. *See Doscher v. Sea Port Grp. Sec., LLC*, No. 15-CV-384 JMF, 2015 WL 4643159 (S.D.N.Y. Aug. 5, 2015); *Goldman v. Citigroup Glob. Markets Inc.*, No. CIV.A. 12-4469, 2015 WL 2377962 (E.D. Pa. May 19, 2015); *Crews v. S & S Serv. Ctr. Inc.*, 848 F. Supp. 2d 595 (E.D. Va.) aff’d sub nom. *Crews v. S&S Serv. Ctr. Inc.*, 474 F. App’x 370 (4th Cir. 2012). However, a federal court has subject matter jurisdiction over a petition to vacate an arbitration award where the basis for vacating an arbitration award is that the arbitrator manifestly disregarded federal law. *Sharlands Terrace, LLC v. 1930 Wright St., LLC*, No. C-11-

1 2503-EDL, 2011 WL 3566816, at *4 (N.D. Cal. Aug. 12, 2011). An exception to this rule exists
2 where the allegation that the arbitrator manifestly disregarded federal law is “patently without
3 merit.” *Id.* Other courts in other circuits have held that federal question jurisdiction in a petition
4 to vacate extends to cases where the interpretation of substantial questions of federal law is
5 required. *See, e.g. Gimbel v. UBS Fin. Servs., Inc.*, No. 08 C 4319, 2009 WL 1904554, at *6
6 (N.D. Ill. May 28, 2009) (where the court found jurisdiction because petitioners’ claim for relief
7 in their petition relied upon an interpretation of SEC rules and regulations).

8 Here, nothing in Sanchez’s petition indicates any issues with federal law or how the
9 arbitrator handled federal law. Sanchez seeks to vacate the arbitration award because (1) the
10 Arbitrator exceeded his powers by disregarding the law by failing to apply Nevada Law on the
11 issue of statute of limitations which would have barred all the claims, and (2) the Arbitrator
12 exceeded his powers by disregarding the law by awarding damages to the Borellis with the effect
13 of putting the Borellis in a better position than if the alleged mismanagement had not occurred.
14 As to his first argument, it is entirely premised on the misapplication of a Nevada state law. The
15 only mention of a federal law is when Sanchez states “although not clear in the complaint,
16 Respondents appear to have alleged violation of Rules 10-b and 10-b(5) of the Securities
17 Exchange Act of 1934,” and notes that the statute of limitations on the Securities Exchange Act
18 is dependent upon Nevada’s Blue Sky laws. However, there Sanchez is arguing that the
19 arbitrator misinterpreted Nevada’s Blue Sky laws, not any federal law. As to Sanchez’s second
20 argument, Sanchez does not indicate any federal law that was disregarded, misinterpreted, or
21 even important to the question at issue. Sanchez’s grievance is with the arbitrator’s misuse of
22 the general legal principle that the award should not put the wronged party in a better position
23 than if the wrong had never occurred. Because Sanchez is not raising any federal issue in his
24 motion to vacate, there is no federal question jurisdiction.

25 **III. Conclusion**

26 IT IS THEREFORE ORDERED that Plaintiff Sanchez’s Motion to Vacate Arbitration
27 Award (ECF No. 1) is DISMISSED for lack of subject matter jurisdiction.

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1 IT IS FURTHER ORDERED that all other pending motions (ECF Nos. 11, 18, 25, and
2 28) are DENIED as moot.

3 IT IS SO ORDERED.

4 DATED this 10th day of August, 2016.



6 LARRY R. HICKS
7 UNITED STATES DISTRICT JUDGE
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